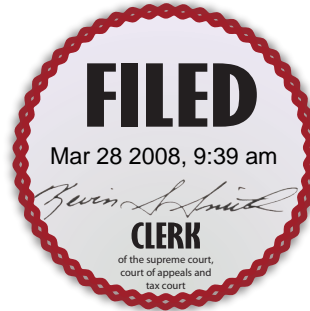


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JULIA DARNELL,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 45A05-0702-CV-81
)	
JOHN DARNELL, LARRY STASSIN and)	
SACHS & HESS, P.C.,)	
)	
Appellee-Defendants.)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
Cause No. 45D01-0507-CT-161

March 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Julia Darnell (“Julia”) appeals a grant of summary judgment in favor of attorney Larry Stassin (“Stassin”) and law firm Sachs & Hess, P.C., upon Julia’s tortious infliction of emotional distress claim arising out of a custody dispute with her former husband, John Darnell (“John”). We affirm.

Issues

Julia presents two issues for review:

- I. Whether a pending discovery dispute precluded the entry of summary judgment; and
- II. Whether Stassin and Sachs & Hess are entitled to summary judgment.¹

Facts and Procedural History

John and Julia were divorced on December 1, 2001, and Julia was awarded custody of the parties’ two children. In late July of 2003, a Hammond Health Department employee investigated a complaint regarding Julia and the children’s residence. On July 23, 2003, John and Julia’s teenaged son permitted John to enter Julia’s home and take photographs and record images on videotape. Julia contended that John manipulated their son to extend the invitation, which John denied. Nevertheless, it is uncontroverted that the photos were taken without Julia’s express consent.

On August 4, 2003, Stassin filed an emergency custody petition on John’s behalf. At the August 26, 2003 custody hearing, John submitted photographs of Julia’s home into evidence, without objection from Julia. The videotape was rejected as duplicative. The trial

¹ The parties have collectively filed various motions to strike and responses thereto. We hereby deny all

court appointed Dr. Marguerite Rebesco to conduct a custody evaluation, the hearing was concluded, and the photographs were returned to counsel. At some future time, Dr. Rebesco was apparently in possession of some photographs of Julia's home. On October 20, 2003, John moved for voluntary dismissal of the emergency petition for custody.

On July 20, 2005, Julia filed a complaint against John, Stassin, and Sachs & Hess, P.C. Julia alleged that John trespassed upon her property, invaded her privacy, and intentionally inflicted emotional distress upon her. Julia alleged that Stassin intentionally or recklessly inflicted emotion distress upon her by "possessing and continuing to possess still photographs and video tape of the interior of [Julia's] house" and "by redisclosing the still photographs at a court hearing" and "by redisclosing the still photographs and/or video tape to Dr. Marguerite Rebesco." (App. 60.) Julia further alleged that Stassin's conduct was committed within the scope of his employment with Sachs & Hess, P.C.

Julia propounded written Interrogatories upon Stassin and Sachs & Hess, P.C., in response to which Stassin and Sachs & Hess, P.C. filed partial answers and a Motion for Protective Order. Julia filed an objection and response. On February 2, 2006, Stassin and Sachs & Hess, P.C. moved for summary judgment. On March 7, 2006, Julia filed her "Plaintiff's Response (Under Protest) to Defense Motion for Summary Judgment." (App. 117.) On October 10, 2006, the trial court conducted a hearing on pending motions. On January 5, 2007, the trial court entered summary judgment in favor of Stassin and Sachs & Hess, P.C., as a final appealable order under Trial Rule 54(B). Julia now appeals.

motions to strike.

I. Alleged Discovery Dispute

Julia contends that a pending discovery dispute precluded the grant of summary judgment. However, the record reflects that the trial court conducted a consolidated hearing on discovery and on the motion for summary judgment. Julia had filed no motion to compel discovery, or Trial Rule 56(F) affidavit,² but had filed her summary judgment response “in protest” because she contended that the defendants’ answers to interrogatories were inadequate.

The discovery issues were entertained first. The trial court stated at the outset of the hearing, “[I]f I find that some of the issues that were in the discovery dispute are relevant to your ability to defend summary judgment then I may make some other orders here today.” (Tr. 7.)

Julia asked for a disclosure of gross fees paid by John to Sachs & Hess, P.C. from 2002 to 2005, details surrounding the receipt, handling, duplication, display, and distribution of photos and videotape from inside Julia’s house, and factual background surrounding the presentation to John’s attorney, including any explanation given. Opposing counsel responded that the amount of fees was irrelevant and that the circumstances surrounding the acquisition of the photographs were well-known to the parties and revealed at the custody hearing.³ Further, counsel argued that the statements made by John when he tendered the

² Trial Rule 56(F) provides: “Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

³ At the custody hearing, John testified as follows: “I had purchased a video camera and a camera because we were going to Florida. And just walked up and came up and I yelled, beeped the horn, yelled at [R.D.], hey

photographs to Stassin were within the attorney-client privilege.

After hearing argument on the discovery issue, the trial court immediately proceeded to hear argument upon the summary judgment motion. The trial court had clearly defined the procedure to be implemented, i.e., the court would hear argument and order broader discovery if necessary to obtain relevant information. By moving forward to entertain the summary judgment motion, the trial court implicitly granted the motion for a protective order. No Trial Rule 56(F) affidavit was before the trial court. The record does not support Julia's claim that discovery issues were pending when the summary judgment order was issued.

II. Grant of Summary Judgment

A. Summary Judgment Standard

When reviewing the propriety of a ruling on a motion for summary judgment, we apply the same standard as the trial court. See Atlantic Coast Airlines v. Cook, 857 N.E.2d 989, 994 (Ind. 2006). Our review of a summary judgment motion is limited to the materials designated to the trial court. Id. A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Am. Mgmt., Inc. v. MIF Realty L.P., 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not

and he come out and I had the video camera going not knowing and he just waived [sic] me in, come on in I got to get my stuff. So I came in and what I saw in the house was just total disarray. . . . And I just went ahead and snapped them [photographs] too while I was doing the video. I could not believe my eyes.” (App. 9-11).

rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Id. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002).

On appeal, the appellant bears the burden of persuasion, but we will assess the trial court's decision to ensure that the parties were not improperly denied their day in court. Ind. Health Ctrs., Inc. v. Cardinal Health Sys., Inc., 774 N.E.2d 992, 999 (Ind. Ct. App. 2002). A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. U-Haul Int'l, Inc. v. Nulls Mach. & Mfg. Shop, 736 N.E.2d 271, 274 (Ind. Ct. App. 2000), trans. denied.

The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. Smith v. Yang, 829 N.E.2d 624, 625 (Ind. Ct. App. 2005). If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Id.

B. Analysis

Julia's claim against Stassin and Sachs & Hess is for tortious infliction of emotional distress, premised upon the possession and disclosure of images of Julia's home.

"One who by extreme and outrageous conduct intentionally or recklessly caused

severe emotional distress to another is subject to liability for such emotional distress.” Cullison v. Medley, 570 N.E.2d 27, 31 (Ind. 1991) (adopting the Restatement (Second) of Torts § 46 (1965)). The elements of the tort are: a defendant (1) engages in extreme and outrageous conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another. Branham v. Celadon Trucking Serv., Inc., 744 N.E.2d 514, 523 (Ind. Ct. App. 2001), trans. denied. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” Id. (quoting the comment to Section 46 of the Restatement (Second) of Torts).

Julia alleged that Stassin possessed visual materials, submitted photographs into evidence, and provided photographs to the custody evaluator. Stassin’s affidavit discloses that he received a videotape and sixteen photographs of Julia’s residence, the latter of which he offered into evidence at the custody hearing but did not disclose to Dr. Rebesco. Dr. Rebesco’s averred as follows: “During the course of my evaluation and thereafter, neither Larry Stassin nor any employee of Sachs & Hess, P.C., displayed any photographic or videographic images of Julia Darnell’s house to me.” (App. 172.) Julia did not then designate materials contradicting those averments. Thus, the conduct at issue as revealed by the designated materials is Stassin’s possession of photographs and their submission into evidence.

Stassin accepted photographs from his client and submitted them into evidence at a

custody hearing without legal objection from opposing counsel.⁴ This does not constitute extreme and outrageous conduct going beyond the bounds of decency.

Furthermore, an attorney has the responsibility “for analyzing, organizing, evaluating and ultimately presenting the evidence which supports his client’s [claim or defense].” Hamed v. Pfeifer, 647 N.E.2d 669, 672 (Ind. Ct. App. 1995). Participants in a judicial proceeding, including attorneys, are absolutely immune from liability for their judicial actions. Id. An attorney is privileged to publish defamatory matter in the course of judicial proceedings, with the qualification that the statements are pertinent and relevant to the case. Id. Absent disputed facts giving rise to the privilege, whether a statement is protected is a question of law. Id. Here, there are no such disputed facts, and the trial court correctly determined that Stassin’s submission of photographs was privileged.

Inasmuch as Stassin and Sachs & Hess, P.C. established that Stassin acted with immunity and negated the outrageousness element of Julia’s claim, they have demonstrated their entitlement to judgment as a matter of law. Summary judgment was properly granted to Stassin and Sachs & Hess, P.C.

Conclusion

Summary judgment was not precluded by an unresolved discovery dispute. Stassin and Sachs & Hess, P.C. are entitled to judgment as a matter of law.

Affirmed.

⁴ Julia’s counsel indicated that he lacked a legal basis for an objection, but wished to express his “contempt.” (App. 161.)

NAJAM, J., and CRONE, J., concur.